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8 IN THE UNITED STATES DISTRICT COURT
9 FOR THE NORTHERN DISTRICT OF CALIFORNIA
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11 ROMUNDO JOHNSON,)

No. C 08-4320 SBA (PR)

12 Petitioner,)

ORDER DENYING PETITION FOR
WRIT OF HABEAS CORPUS

13 v.)

14 FELKER, Warden,)

15 Respondent.)
16 _____)

17 **INTRODUCTION**

18 This matter is now before the Court for consideration of Petitioner's pro se petition for a writ
19 of habeas corpus under 28 U.S.C. § 2254 challenging a conviction he received in Monterey County
20 Superior Court. Respondent has filed an answer addressing the merits of the petition. Petitioner has
21 filed a traverse. For the reasons discussed below, the petition is DENIED as to all claims.

22 **BACKGROUND**

23 **I. Case History**

24 On August 1, 2004, Petitioner Romundo Johnson fought with his girlfriend and held her by
25 the throat until she passed out. On August 8, 2004, he punched her in the face and elsewhere about
26 her body and stabbed her in the arm. On August 12, 2004, he ripped out the telephone because he
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1 did not want her to use it any more.

2 A state court jury found Petitioner guilty of the following: (1) one count of corporal injury to
3 cohabitant (Cal. Penal Code § 273.5(a)) based on an August 1, 2004 incident, (2) one count of
4 assault by means likely to produce great bodily injury (Cal. Penal Code § 245(a)(1)) based on an
5 August 1, 2004 incident, (3) three counts of corporal injury to a cohabitant (Cal. Penal Code
6 § 273.5) based on an August 8, 2004 incident, and (4) one count of disabling a telephone line (Cal.
7 Penal Code § 591) based on an August 12, 2004 incident. (Resp't Ex. 6 at 1.) The trial court
8 sentenced Petitioner to a term of sixteen years and four months. (*Id.*) The California Court of
9 Appeal affirmed the judgment in a published opinion dated May 22, 2007 (*id.*), and the California
10 Supreme Court denied a petition for review on September 25, 2007, (Resp't Ex. 11).

11 Petitioner filed the instant petition on September 15, 2008, and claimed that: (1) the trial
12 court erred in permitting the jury to hear testimony about a prior victim's statement because it
13 violated the Confrontation Clause; (2) the trial court erred in convicting him because there was
14 insufficient evidence to support a conviction of disabling a telephone line, and the term "unlawful"
15 was not defined for the jury; and (3) the trial court erred in imposing three counts of corporal injury
16 to a cohabitant based on a single continuous assault.

17 On December 4, 2009, Respondent was ordered to show cause why the petition should not be
18 granted.. Respondent filed an answer and memorandum of points and authorities on April 2, 2010,
19 and lodged a number of exhibits. Petitioner filed a traverse on May 28, 2010.
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21 **II. Statement of Facts**

22 The following facts are taken from the opinion of the California Court of Appeal:

23 The victim, known as Jane Doe at trial, lived with defendant for about
24 two or three months during 2004. On August 1, 2004, Doe and defendant had
25 been drinking wine when defendant became violent and choked her so tightly
she passed out and landed, facedown, on the hard kitchen floor. The fall
resulted in a knot on her forehead and a bruise by her eye.

26 A week later, defendant became angry with Doe because he thought she had
27 been talking to one of his friends. As Doe testified, "That's when he beat me up real
28 bad." He punched her in the nose, eyes, and mouth. He choked her and held her by her
throat against the wall. He struck her on her neck, her arm, her lower back, and her leg.
He also stabbed her in the left arm. Doe could not see what it was he used to stab her;

1 she just knew that she suffered a bleeding wound during the struggle. At trial, Doe still
2 had a scar on her left upper arm.

3 The prosecution introduced photographs of Doe's injuries taken on August 12,
4 2004, four days after the beating. The photographs showed Doe with two black eyes, a
5 split lip, and bruising on her neck, upper chest, and the right side of her face. There
6 was bruising and an open wound on her arm. The back of her neck was bruised as was
7 the part of her back over the left shoulder blade and her right hip. There was bruising
8 on the undersides of both arms that, Doe speculated, must have occurred when
9 defendant held her back as she tried to fight him off.

10 When the beating was over, Doe did not call the police because she did not want
11 defendant to get in trouble. When, at her sister's urging, she called the police on
12 August 12, 2004, rather than go to the police department, Doe asked the police to come
13 to her because she was "embarrassed" to go outside.

14 On the morning of August 12, 2004, before Doe called the police, Doe and
15 defendant had another argument. Defendant told her she had too many people in the
16 house. He cut the telephone cord, pried the telephone jack out of the wall with a
17 hammer, cut the cables on the television, and left the apartment, taking the telephone
18 with him because, he said, he did not want her to use it.

19 Epifanio Seville, a former public safety officer with the City of Marina, testified
20 about defendant's involvement in a prior incident of domestic violence. In August
21 1995, Seville responded to a report of a domestic disturbance. When he reached the
22 address, he knocked and, at first, did not hear anything. After a second knock he heard
23 a woman screaming from inside the apartment. Defendant answered the door. There
24 was blood on his hands and his shirt. A woman was screaming from the back of the
25 residence. Seville went inside and found a woman in the bathroom, sitting on the
26 toilet, slumped over and covering her face. She had blood on her hands and her face.
27 When the woman removed her hands from her face, Seville saw that her nose was
28 swollen and red and the bridge of her nose was purplish. The woman was "pretty
emotional, distraught" and crying. Seville spoke to her to see if she was okay and
"make sure she got some medical treatment." Seville asked her "what happened" and
she said, "He punched me in the face, look at my nose." Seville then determined that
the woman had been living with defendant and that he was the father of her
one-year-old child. Seville identified photographs of the woman with a red, swollen,
and bleeding nose. This, he said, was her condition when he saw her in August 1995.

The prosecution also produced another prior victim who had had a dating or
habitation relationship with defendant. In November of 2002, the victim and defendant
had an argument about the music being played in their residence. In his anger
defendant damaged bottles in the kitchen and plants and tables in the living room. He
broke the mantelpiece and he broke or threw on the floor the items that had been on the
mantelpiece, the fireplace tools, and the stereo speaker. Then, in leaving, defendant
pushed the victim so hard that she almost fell over the balcony railing.

Defendant did not testify. His defense was to challenge Doe's credibility and
argue that she must have received her injuries when she went out to a local bar to check
on her uncle.

People v. Johnson, 150 Cal. App. 4th 1467, 1472-73 (2007). (Resp't Ex. 6 at 2-4.)

DISCUSSION

I. Legal Standard

A. Standard of Review for State Court Decisions

Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a district court may grant a petition challenging a state conviction or sentence on the basis of a claim that was “adjudicated on the merits” in state court only if the state court’s adjudication of the claim: “(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d). A state court has “adjudicated” a petitioner’s constitutional claim “on the merits” for purposes of § 2254(d) when it has decided the petitioner’s right to post-conviction relief on the basis of the substance of the constitutional claim advanced, rather than denying the claim on the basis of a procedural or other rule precluding state court review on the merits. Lambert v. Blodgett, 393 F.3d 943, 969 (9th Cir. 2004). It is error for a federal court to review de novo a claim that was adjudicated on the merits in state court. See Price v. Vincent, 538 U.S. 634, 638-43 (2003).

1. Section 2254(d)(1)

Challenges to purely legal questions resolved by a state court are reviewed under § 2254(d)(1), under which a state prisoner may obtain habeas relief with respect to a claim adjudicated on the merits in state court only if the state court adjudication resulted in a decision that was “contrary to” or “involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States.” Williams v. Taylor, 529 U.S. 362, 402-04, 409 (2000). While the “contrary to” and “unreasonable application” clauses have independent meaning, see id. at 404-05, they often overlap, which may necessitate examining a petitioner’s allegations against both standards, see Van Tran v. Lindsey, 212 F.3d 1143, 1149-50 (9th Cir. 2000), overruled on other grounds, Lockyer v. Andrade, 538 U.S. 63, 70-73 (2003).

1 **a. Clearly Established Federal Law**

2 “Clearly established federal law, as determined by the Supreme Court of the United States”
 3 refers to “the holdings, as opposed to the dicta, of [the Supreme] Court’s decisions as of the time of
 4 the relevant state-court decision.” Williams, 529 U.S. at 412. “Section 2254(d)(1) restricts the
 5 source of clearly established law to [the Supreme] Court’s jurisprudence.” Id. “A federal court may
 6 not overrule a state court for simply holding a view different from its own, when the precedent from
 7 [the Supreme] Court is, at best, ambiguous.” Mitchell v. Esparza, 540 U.S. 12, 17 (2003). If there is
 8 no Supreme Court precedent that controls on the legal issue raised by a petitioner in state court, the
 9 state court’s decision cannot be contrary to, or an unreasonable application of, clearly-established
 10 federal law. See, e.g., Stevenson v. Lewis, 384 F.3d 1069, 1071 (9th Cir. 2004).

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 12 The fact that Supreme Court law sets forth a fact-intensive inquiry to determine whether
 13 constitutional rights were violated “obviates neither the clarity of the rule nor the extent to which the
 14 rule must be seen as ‘established’” by the Supreme Court. Williams, 529 U.S. at 391. There are,
 15 however, areas in which the Supreme Court has not established a clear or consistent path for courts
 16 to follow in determining whether a particular event violates a constitutional right; in such an area, it
 17 may be that only the general principle can be regarded as “clearly established.” Andrade, 538 U.S.
 18 at 64-65. When only the general principle is clearly established, it is the only law amenable to the
 19 “contrary to” or “unreasonable application of” framework. See id. at 73.

20 Circuit decisions may still be relevant as persuasive authority to determine whether a
 21 particular state court holding is an “unreasonable application” of Supreme Court precedent or to
 22 assess what law is “clearly established.” Clark v. Murphy, 331 F.3d 1062, 1070-71 (9th Cir. 2003);
 23 Duhaime v. Ducharme, 200 F.3d 597, 600 (9th Cir. 1999).

24 **b. “Contrary to”**

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 26 “Under the ‘contrary to’ clause, a federal habeas court may grant the writ if the state court
 27 arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the
 28 state court decides a case differently than [the Supreme] Court has on a set of materially

indistinguishable facts.” Williams, 529 U.S. at 413. A “run-of-the-mill state-court decision” that correctly identifies the controlling Supreme Court framework and applies it to the facts of a prisoner’s case “would not fit comfortably within § 2254(d)(1)’s ‘contrary to’ clause.” Williams, 529 U.S. at 406. Such a case should be analyzed under the “unreasonable application” prong of § 2254(d). See Weighall v. Middle, 215 F.3d 1058, 1062 (9th Cir. 2000).

c. “Unreasonable Application”

“Under the ‘unreasonable application’ clause, a federal habeas court may grant the writ if the state court identifies the correct governing legal principle from [the Supreme] Court’s decisions but unreasonably applies that principle to the facts of the prisoner’s case.” Williams, 529 U.S. at 412-13. “[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.” Id. at 411; accord Middleton v. McNeil, 541 U.S. 433, 436 (2004) (per curiam) (challenge to state court’s application of governing federal law must be not only erroneous, but objectively unreasonable); Woodford v. Visciotti, 537 U.S. 19, 25 (2002) (per curiam) (“unreasonable” application of law is not equivalent to “incorrect” application of law).

Evaluating whether a rule application was unreasonable requires considering the relevant rule’s specificity; if a legal rule is specific, the range of reasonable judgment may be narrow; if it is more general, the state courts have more leeway. Yarborough v. Alvarado, 541 U.S. 652, 664 (2004). Whether the state court’s decision was unreasonable must be assessed in light of the record that court had before it. Holland v. Jackson, 542 U.S. 649, 651 (2004) (per curiam).

The objectively unreasonable standard is not a clear error standard. Andrade, 538 U.S. at 75-76 (rejecting Van Tran’s use of “clear error” standard); Clark, 331 F.3d at 1067-69 (acknowledging the overruling of Van Tran on this point). After Andrade,

[t]he writ may not issue simply because, in our determination, a state court’s application of federal law was erroneous, clearly or otherwise. While the “objectively unreasonable” standard is not self-explanatory, at a minimum it denotes a greater degree of deference to the state courts than [the Ninth Circuit]

1 ha[s] previously afforded them.

2 Id. In examining whether the state court decision was unreasonable, the inquiry may require
3 analysis of the state court’s method as well as its result. Nunes v. Mueller, 350 F.3d 1045, 1054 (9th
4 Cir. 2003).

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6 **2. Sections 2254(d)(2), 2254(e)(1)**

7 A federal habeas court may grant a writ if it concludes a state court’s adjudication of a claim
8 “resulted in a decision that was based on an unreasonable determination of the facts in light of the
9 evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(2). An unreasonable
10 determination of the facts occurs where a state court fails to consider and weigh highly probative,
11 relevant evidence, central to a petitioner’s claim, that was properly presented and made part of the
12 state court record. Taylor v. Maddox, 366 F.3d 992, 1005 (9th Cir. 2004). A district court must
13 presume correct any determination of a factual issue made by a state court unless a petitioner rebuts
14 the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

15 Section 2254(d)(2) applies to an intrinsic review of a state court’s fact-finding process, or
16 situations in which the petitioner challenges a state court’s fact-findings based entirely on the state
17 court record, whereas § 2254(e)(1) applies to challenges based on extrinsic evidence, or evidence
18 presented for the first time in federal court. See Taylor, 366 F.3d at 999-1000. In Taylor, the Ninth
19 Circuit established a two-part analysis under §§ 2254(d)(2) and 2254(e)(1). Id. First, federal courts
20 must undertake an “intrinsic review” of a state court’s fact-finding process under the “unreasonable
21 determination” clause of § 2254(d)(2). Id. at 1000. The intrinsic review requires federal courts to
22 examine the state court’s fact-finding process, not its findings. Id. Once a state court’s fact-finding
23 process survives this intrinsic review, the second part of the analysis begins by dressing the state
24 court finding in a presumption of correctness under § 2254(e)(1). Id. According to the AEDPA, this
25 presumption means that the state court’s fact-finding may be overturned based on new evidence
26 presented by a petitioner for the first time in federal court only if such new evidence amounts to
27 clear and convincing proof a state court finding is in error. See 28 U.S.C. § 2254(e)(1).
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1 “Significantly, the presumption of correctness and the clear-and-convincing standard of proof only
2 come into play once the state court’s fact-findings survive any intrinsic challenge; they do not apply
3 to a challenge that is governed by the deference implicit in the ‘unreasonable determination’
4 standard of section 2254(d)(2).” Taylor, 366 F.2d at 1000.

5 When there is no reasoned opinion from the highest state court to consider the Petitioner’s
6 claims, the Court looks to the last reasoned opinion. See Ylst v. Nunnemaker, 501 U.S. 797, 801-06
7 (1991). Here, the California Court of Appeal was the highest state court to issue an explained
8 opinion on Petitioner’s claims.

9 **II. Exhaustion**

10 Prisoners in state custody who wish to challenge collaterally in federal habeas proceedings
11 either the fact or length of their confinement are required first to exhaust state judicial remedies,
12 either on direct appeal or through state collateral proceedings, by presenting the highest state court
13 available with a fair opportunity to rule on the merits of each and every claim they seek to raise in
14 federal court. See 28 U.S.C. § 2254(b),(c); Granberry v. Greer, 481 U.S. 129, 133-34 (1987). The
15 parties do not dispute that Petitioner has exhausted his claims. The Court, therefore, considers
16 Petitioner’s claims on the merits.

17 **III. Legal Claims**

18 Petitioner alleges that: (1) the trial court erred in permitting the jury to hear testimony about
19 a prior victim’s statement because it violated the Confrontation Clause; (2) the trial court erred in
20 convicting Petitioner because there was insufficient evidence to support a conviction of disabling a
21 telephone line, and the term “unlawful” was not defined for the jury; and (3) the trial court erred in
22 imposing three counts of corporal injury to cohabitant based on a single continuous assault.

23 **1. Confrontation Clause**

24 Petitioner contends that the trial court erred in allowing Sevillo to testify about a statement
25 made by a prior domestic violence victim of Petitioner’s, in lieu of the victim herself, because the
26 prior victim’s statement was testimonial. (Pet. at 6; Docket No. 1.) Respondent asserts that because
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1 there was an ongoing emergency when the prior victim's statement was made, the statement was not
 2 testimonial in nature, and the trial court did not err in allowing Seville to testify about the statement.
 3 (Resp't Mem. of P. & A. at 3; Docket No. 10.)

4 The Sixth Amendment bars "admission of testimonial statements of a witness who did not
 5 appear at trial unless he was unable to testify and the defendant had had a prior opportunity for
 6 cross-examination." Crawford v. Washington, 541 U.S. 36, 51 (2004). Statements are not
 7 testimonial "when made in the course of police interrogation under circumstances indicating that the
 8 primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency."
 9 Davis v. Washington, 547 U.S. 813, 822 (2006). However, statements are "testimonial when the
 10 circumstances objectively indicate that there is no such ongoing emergency, and the primary purpose
 11 of the interrogation is to establish or prove past events potentially relevant to later criminal
 12 prosecution." Id. at 822 (footnote omitted).

13
 14 In Davis,¹ 547 U.S. 813, the United States Supreme Court consolidated two separate cases:
 15 (1) Davis v. Washington and (2) Hammon v. Indiana.² In Davis, the Court determined that a
 16 recording taken by a 911 operator was nontestimonial because the victim was "speaking about
 17 events as they were actually happening," and she was calling for "help against [a] bona fide physical
 18 threat." Id. at 827. Consequently, the circumstances surrounding the call "objectively indicate[d
 19 that] its primary purpose was to enable police assistance to meet an ongoing emergency." Id. at 828.
 20 Thus, the Confrontation Clause did not bar the introduction of the 911 report. In contrast, in
 21 Hammon, officers responded to a domestic disturbance call and found the victim "alone on the front
 22 porch." Id. at 819. After gaining the victim's permission, the officers entered the house and noticed
 23 broken glass on the floor of the house. Id. One of the officers took the victim to a separate room
 24 and asked her what had happened. Id. at 819-20. After hearing the victim's account, the officer
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26 ¹ All references to Davis are to the Supreme Court case Davis, 547 U.S. 813, unless otherwise
 27 specified.

28 ² Hammon v. Indiana, 546 U.S. 976 (2005), was consolidated with Davis v. Washington, 546
 U.S. 975 (2005). All references to Hammon, unless otherwise specified, refer to the Hammon
 portion of the consolidated Davis Supreme Court case. See Davis, 547 U.S. 813.

1 gave the victim a “battery affidavit” which she signed. Id. at 820 (internal quotations omitted). The
 2 Court held that statements taken by the officer were testimonial because the victim’s statement was
 3 merely a “narrative of past events” that was delivered in a safe environment. Id. at 832.

4 Petitioner argues that based on Davis, the statement of the prior victim in the instant case
 5 should have been barred because it was testimonial. (Pet’r’s Traverse (“Traverse”) at 3; Docket No.
 6 11.) Petitioner contends that there was no ongoing emergency when Seville questioned the prior
 7 victim. (Id.) Specifically, Petitioner claims that the instant case is similar to Hammon, and thus, the
 8 prior victim’s statement in the case at bar is testimonial. (Id.) However, Respondent counters that
 9 the instant case can be distinguished from Hammon, because in the instant case, the prior victim was
 10 bleeding and screaming for help, and Seville did not “memorialize” the event with an affidavit.
 11 (Resp’t Mem. of P. & A. at 6.) Furthermore, unlike in Hammon where the victim was describing
 12 earlier events, here, the prior victim was in “imminent danger” and was not acting as a witness or
 13 testifying. Id. Thus, Respondent argues that Seville questioned the prior victim to determine
 14 whether medical assistance was required. (Id.)
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16 The California Court of Appeal rejected Petitioner’s argument:

17 The facts surrounding the prior victim’s statement to Seville do straddle the line
 18 between the two cases decided in Davis. We decide the issue by applying the test set
 19 forth by the court: Did the circumstances objectively indicate that there was an ongoing
 20 emergency when the victim made the statement to Seville? We think they do. Seville
 21 heard the woman screaming as he stood at the door; the man who answered the door
 22 had blood on his hands; and the woman in the bathroom had a bloody, broken nose.
 23 That is the only information the officer had when he asked “What happened?” Indeed,
 24 although he might have suspected domestic violence, Seville did not know at that point
 25 whether or not a crime had been committed. The officer interrupted an ongoing
 26 emergency and obtained information from the victim in order to assess the situation.
 27 Thus, her statement to him was not testimonial.

28 (Resp’t Ex. 6 at 12.)

 Petitioner’s attempt to analogize the instant case to Hammon is unpersuasive because, unlike
 the victim in Hammon, here, the prior victim was bleeding profusely and screaming for help.³

³ Petitioner claims that the prior victim’s cry “was not a cry for help to enable officers to immediately end a threatening situation.” (Traverse at 5.) However, Petitioner provides no evidence supporting his contention. A federal habeas court may grant a writ if it concludes a state

(Resp't Ex. 6 at 3.) Under this record, the California Court of Appeal reasonably concluded that Sevillo "interrupted an ongoing emergency," and that the purpose of his questions was to "assess the situation." (*Id.* at 12.) Therefore, the state court's finding that the prior victim's statement was nontestimonial was not an unreasonable determination.

Moreover, even if the prior victim's statement were testimonial, Petitioner is not entitled to relief. For purposes of federal habeas review, the standard applicable to violations of the Confrontation Clause is whether the inadmissible evidence had an actual and prejudicial effect on the jury's verdict. *Hernandez v. Small*, 282 F.3d 1132, 1144 (9th Cir. 2002) (citing *Brecht v. Abrahamson*, 507 U.S. 619 (1993)). Here, on account of the extensive evidence supporting Petitioner's conviction, any error in admitting the prior victim's statement did not have an actual and prejudicial effect on the jury's verdict. *See Hernandez*, 282 F.3d at 1144. Accordingly, the trial court's decision to permit testimony regarding a prior victim's statement was neither contrary to, nor an unreasonable application of clearly established federal law. *See* 28 U.S.C. § 2254(d).

2. Conviction for Disabling a Telephone Line

Petitioner contends that there was insufficient evidence to support a conviction for disabling

court's adjudication of a claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). An unreasonable determination of the facts occurs where a state court fails to consider and weigh highly probative, relevant evidence, central to a petitioner's claim, that was properly presented and made part of the state court record. *Taylor*, 366 F.3d at 1005. A district court must presume correct any determination of a factual issue made by a state court unless a petitioner rebuts the presumption of correctness by clear and convincing evidence. 28 U.S.C. § 2254(e)(1). Section 2254(d)(2) applies to an intrinsic review of a state court's fact-finding process, or situations in which the petitioner challenges a state court's fact-findings based entirely on the state court record, whereas § 2254(e)(1) applies to challenges based on extrinsic evidence, or evidence presented for the first time in federal court. *See Taylor*, 366 F.3d at 999-1000. In *Taylor*, the Ninth Circuit established a two-part analysis under §§ 2254(d)(2) and 2254(e)(1). *Id.* First, federal courts must undertake an "intrinsic review" of a state court's fact-finding process under the "unreasonable determination" clause of § 2254(d)(2). *Id.* at 1000. The intrinsic review requires federal courts to examine the state court's fact-finding process, not its findings. *Id.* Once a state court's fact-finding process survives this intrinsic review, the second part of the analysis begins by dressing the state court finding in a presumption of correctness under § 2254(e)(1). *Id.* Here, the state court's determination that the prior victim screamed for help is supported by the record because the prior victim had just been assaulted and was bleeding. (*See* Resp't Ex. 6 at 12.) Thus, based on an intrinsic review under § 2254(d)(2), the state court's fact finding process was not unreasonable. Furthermore, Petitioner does not provide evidence to rebut the presumption of correctness; therefore, the California Court of Appeal's version of the facts control under § 2254(e)(1).

1 a telephone line, and that the trial court erred in failing to define the term “unlawful” for the jury.
 2 (Pet. at 6.) Respondent claims that Petitioner has not raised a federal question because the California
 3 Court of Appeal resolved the issue as a matter of statutory interpretation. (Resp’t Mem. of P. & A.
 4 at 7.)

5
 6 **a. Insufficient Evidence**

7 The Due Process Clause “protects the accused against conviction except upon proof beyond
 8 a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” In re
 9 Winship, 397 U.S. 358, 364 (1970). A state prisoner who alleges that the evidence in support of his
 10 state conviction cannot be fairly characterized as sufficient to have led a rational trier of fact to find
 11 guilt beyond a reasonable doubt therefore states a constitutional claim, see Jackson v. Virginia, 443
 12 U.S. 307, 321 (1979), which, if proven, entitles him to federal habeas relief, see id. at 324.
 13 However, the Supreme Court has “repeatedly held that a state court’s interpretation of state law,
 14 including one announced on direct appeal of the challenged conviction, binds a federal court sitting
 15 in habeas corpus.” Bradshaw v. Richey, 546 U.S. 74, 76 (2005) (citing Estelle v. McGuire, 502 U.S.
 16 62, 67-68 (1991)).

17 The state’s highest court is the final authority on the law of that state. Sandstrom v.
 18 Montana, 442 U.S. 510, 516-17 (1979). Even a determination of state law made by an intermediate
 19 appellate court must be followed and may not be “disregarded by a federal court unless it is
 20 convinced by other persuasive data that the highest court of the state would decide otherwise.”
 21 Hicks v. Feiock, 485 U.S. 624, 630 n.3 (1988) (quoting West v. American Telephone & Telegraph
 22 Co., 311 U.S. 223, 237-38 (1940)).

23
 24 Petitioner contends that, as a matter of law, he cannot be convicted for a violation of Cal.
 25 Penal Code § 591⁴ because he disabled his own phone. Section 591 provides, in relevant part, that
 26 “[a] person who unlawfully and maliciously takes down, removes, injures, or obstructs any line of
 27 telegraph, telephone, or cable television . . . is punishable by imprisonment in the state prison”

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⁴ All further statutory references are to the California Penal Code unless otherwise indicated.

1 Petitioner also claims that he did not remove the phone immediately after assaulting the victim, nor
2 did he prevent her from calling the police. (Traverse at 7.) According to Petitioner, there is no
3 evidence that he removed the phone with any “unlawful purpose in mind.” (Id.) Therefore,
4 Petitioner asserts that his act of removing the telephone was not independently unlawful because the
5 telephone line was in an apartment rented in his name and the “telephone was his personal
6 property.” (Id. at 6.)

7
8 As a threshold matter, the Court must first determine whether “unlawful” is a required
9 element of a section 591 conviction. See Jackson, 443 U.S. at 324 & n.16 (noting that sufficiency of
10 evidence claims are reviewed based on the elements defined by state law). The California Court of
11 Appeal concluded that under California law, “one may violate [section 591] by disabling one’s own
12 telephone so long as one acts “unlawfully and maliciously” in doing so.” (Resp’t Ex. 6 at 13
13 (citing People v. McElroy, 126 Cal. App. 4th 874, 883 (2005)).) Additionally, the court determined,
14 as a matter of statutory interpretation, that section 591 conviction does not require “the conduct be
15 unlawful *independent of* the prohibition contained in section 591,” and that “[p]roof that a person did
16 the act with malice is proof that the act was unlawful.” (Resp’t Ex. 6 at 16.) Notably, Petitioner
17 fails to refute Respondent’s contention that “[t]he California Supreme Court has never opined that
18 section 591 includes a separate and independent showing of unlawfulness that exceeds the act of
19 damaging the utility line itself.” (Resp’t Mem. of P. & A. at 13.) Furthermore, this Court is
20 unaware of any California Supreme Court cases that contradict the California Court of Appeal’s
21 ruling. Accordingly, this Court is bound by the California Court of Appeal’s decision that
22 “unlawful” is not a required element of a section 591 conviction.

23 The California Court of Appeal also rejected Petitioner’s claim that there was insufficient
24 evidence to sustain a section 591 conviction:

25 Defendant does not dispute that the evidence was sufficient to support the jury’s implied
26 finding of malice. Nor does defendant argue that his conduct in removing the telephone and
27 jack was lawful beyond the fact that the conduct did not violate a law other than section 591.
28 That is to say, there was no evidence of excuse or justification. Accordingly, the evidence
was sufficient to support defendant’s conviction of section 591.
(Resp’t Ex. 6 at 18.)

1 In reviewing a claim challenging the sufficiency of the evidence, the relevant inquiry “must
 2 be not to simply determine whether the jury was properly instructed, but to determine whether the
 3 record evidence could reasonably support a finding of guilt beyond a reasonable doubt.” Jackson,
 4 443 U.S. at 318. However, “this inquiry does not require a court to ‘ask’ itself whether it believes
 5 that the evidence at trial established guilt beyond a reasonable doubt.” Id. at 318-19 (citing Woodby
 6 v. INS, 385 U.S. 276, 282 (1966)). Rather, “the relevant question is whether, after viewing the
 7 evidence in the light most favorable to the prosecution, any rational trier of fact could have found the
 8 essential elements of the crime beyond a reasonable doubt.” Jackson, 443 U.S. at 319 (citing
 9 Johnson v. Louisiana, 406 U.S. 356, 362 (1972)). Here, the Court of Appeal found sufficient
 10 evidence to support the conviction. Petitioner does not dispute that he acted *with malice*, and the
 11 Court of Appeal determined that Petitioner’s actions did not need to be independently unlawful.
 12 (See Resp’t Ex. 6 at 18). Taken in the light most favorable to the prosecution, this Court concludes
 13 that a reasonable juror could have found Petitioner guilty of section 591. See Jackson, 443 U.S. at
 14 319. Accordingly, Petitioner’s insufficiency of evidence claim fails.

15
 16 **b. Jury Should Have Received Instructions Defining the Term “Unlawful”**

17 A jury instruction that omits an element of an offense is constitutional error subject to federal
 18 habeas review. See Neder v. United States, 527 U.S. 1, 8-11 (1999). The California Court of
 19 Appeal rejected Petitioner’s argument that the jury should have received instructions defining the
 20 term “unlawful”:

21 Defendant also argues that the trial court should have defined the term
 22 “unlawful” for the jury. No such instruction was warranted. We have concluded that
 23 the statute does not require a finding that the conduct was independently unlawful.
 24 And since there was no evidence of excuse or justification for the conduct, the concept
 of unlawfulness as it is used in section 591 was superfluous and there was no reason to
 instruct the jury on the point or to define the term.

25 (Resp’t Ex. 6 at 18.)

26 Petitioner’s argument is unavailing because, according to state statutory interpretation, an
 27 “unlawful” act is not an element of the offense. (Id.) Because the Supreme Court has “repeatedly
 28 held that a state court’s interpretation of state law, including one announced on direct appeal of the

1 challenged conviction, binds a federal court sitting in habeas corpus,” this Court is bound by the
 2 California Court of Appeal’s conclusion that “unlawful” is not an essential element of a section 591
 3 conviction. See Bradshaw, 546 U.S. at 76. Thus, the failure to define “unlawful” to the jury was not
 4 a failure to define an essential element of the crime. Cf. In re Winship, 397 U.S. at 364 (holding that
 5 a due process violation occurs when one is convicted without “proof beyond a reasonable doubt of
 6 every fact necessary to constitute the crime with which he is charged.”). Accordingly, the California
 7 Court of Appeal’s conclusion regarding jury instructions was neither contrary to, nor an
 8 unreasonable application of, clearly established federal law, nor was it based upon an unreasonable
 9 determination of the facts in light of the evidence presented. See 28 U.S.C. § 2254(d).

10 **3. Multiple Convictions for Corporal Injury to Cohabitant**

11
 12 Petitioner contends that the trial court abused its discretion and violated section 654⁵ when it
 13 sentenced him on three counts of section 273.5⁶ that stemmed from a single continuous assault on
 14 August 8, 2004. (Pet. at 6.) In other words, Petitioner argues that a single assault can only lead to a
 15 conviction of a single count of battery because “the state cannot split up one crime and prosecute it
 16 in parts.” (Id.) Respondent asserts that Petitioner fails to raise a federal question in his attack on the
 17 California Court of Appeal’s determination that Petitioner could be charged with multiple counts of
 18 battery under California law because the victim sustained multiple injuries on various parts of her
 19 body. (Resp’t Mem. of P. & A. at 14.)

20 A person in custody pursuant to the judgment of a state court can obtain a federal writ of
 21 habeas corpus only on the ground that he is in custody in violation of the Constitution or laws or
 22 treaties of the United States. 28 U.S.C. § 2254(a). In other words, “it is only noncompliance with
 23

24
 25 ⁵ In relevant part, section 654 provides: “An act or omission that is punishable in different
 26 ways by different provisions of law shall be punished under the provision that provides for the
 27 longest potential term of imprisonment, but in no case shall the act or omission be punished under
 28 more than one”

⁶ In relevant part, section 273.5 provides: “Any person who willfully inflicts upon a person
 who is his or her spouse, former spouse, cohabitant, former cohabitant, or the mother or father of his or
 her child, corporal injury resulting in a traumatic condition, is guilty of a felony”

1 federal law that renders a State's criminal judgment susceptible to collateral attack in the federal
2 courts." Wilson v. Corcoran, 131 S. Ct. 13, 16 (2010) (emphasis in original). The Supreme Court
3 has repeatedly held that federal habeas writ is unavailable for violations of state law or for alleged
4 error in the interpretation or application of state law. See Swarthout v. Cooke, 131 S. Ct. 859, 861-
5 62 (2011); see, e.g., Stanton v. Benzler, 146 F.3d 726, 728 (9th Cir. 1998) (state law determination
6 that arsenic trioxide is a poison as a matter of law and not an element of the crime for jury
7 determination is not open to challenge on federal habeas review).

8
9 Nothing in the record suggests that Petitioner has raised a claim that warrants federal habeas
10 relief. Neither the petition for a writ of habeas corpus nor the state petition for review alleges a
11 federal violation. Petitioner merely claims that a state court wrongly interpreted state law when it
12 convicted him on multiple counts of section 273.5. Without more, Petitioner fails to establish a
13 federal claim. See Swarthout, 131 S. Ct. at 861-62. Accordingly, Petitioner's claim does not
14 warrant federal habeas relief.


15 CONCLUSION

16 For the foregoing reasons, the petition for a writ of habeas corpus is DENIED. The Clerk of
17 the Court shall enter judgment and close the file.

18 No certificate of appealability is warranted in this case. See Rule 11(a) of the Rules
19 Governing § 2254 Cases, 28 U.S.C. foll. § 2254 (requiring district court to rule on certificate of
20 appealability in same order that denies petition). Petitioner has failed to make a substantial showing
21 that any of his claims amounted to a denial of his constitutional rights or demonstrate that a
22 reasonable jurist would find this Court's denial of his claims debatable or wrong. See Slack v.
23 McDaniel, 529 U.S. 473, 484 (2000).
24

25 IT IS SO ORDERED.

26 DATED: 9/8/11


27 SAUNDRA BROWN ARMSTRONG
28 United States District Judge

1 UNITED STATES DISTRICT COURT
2 FOR THE
3 NORTHERN DISTRICT OF CALIFORNIA
4

5 ROMUNDO JOHNSON,

6 Plaintiff,

7 v.
8

9 FELKER et al,

10 Defendant.
11 _____/

Case Number: CV08-04320 SBA

CERTIFICATE OF SERVICE

12
13 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District
14 Court, Northern District of California.

15 That on September 9, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said
16 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing said
17 envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle
18 located in the Clerk's office.
19
20

21 Romundo Johnson V-84332
22 Pleasant Valley State Prison
23 P.O. Box 8503
24 Coalinga, CA 93210

25 Dated: September 9, 2011

Richard W. Wieking, Clerk

By: LISA R CLARK, Deputy Clerk
26
27
28